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Pitfalls of the homemade will from a Cayman perspective

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As a longstanding wills and estate practitioner I have encountered many homemade wills. I have yet to be impressed with any that have come across my desk, and that includes those cheap 'fill in the blank' template wills found online. While it may be tempting to save on the lawyers' fees, let me explain why that is a really bad idea.

You can only give what you've got

As a fundamental point of law, you can only give away assets you actually own outright. For example, if you have a joint asset, such as a joint bank account with your spouse, it will usually pass automatically on your death to the surviving spouse. If you try to give away 'your' joint bank account in your will — as a gift, for example — it will likely fail. Therefore, if you are attempting to achieve a sense of balance amongst the beneficiaries of your estate, your misunderstanding of how the law works may in fact create an imbalance. Such imbalances have the potential to cause disputes and may breed resentment amongst your beneficiaries. This could result in expensive estate litigation, which will not only impede the administration of your estate but also drain its value.

Failed gifts

What happens if a beneficiary dies before you or they refuse to accept their gift from the estate? Professional wills have provisions to deal with such situations. Most homemade wills do not take such scenarios into account. If there is no provision in the homemade will to deal with such failed gifts, it will pass in accordance with intestacy provisions, which may result an unintended distribution of estate assets.

Assets overseas?

What if you have assets in other jurisdictions outside of the Cayman Islands? There is no guarantee that those other jurisdictions will accept your homemade will, no matter how clear the terms, even if your will is expressed to apply to your worldwide assets (which most homemade wills do not). This is because succession laws differ depending on each jurisdiction in question, and in the case of real property (houses, buildings, etc.) the law which governs succession is the law where such real property is located. In the Cayman Islands you are free to dispose of your assets as you see fit, but that is not the case in other jurisdictions which may have laws in place that dictate to whom your assets should go. Also, while there are no inheritance taxes or death duties

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in the Cayman Islands you cannot predict how your foreign assets (and sometimes your Cayman assets) will be taxed by foreign tax authorities. There may, therefore, be lost opportunities to make your estate more tax efficient unless these factors are taken into account in your will.

Executors

Executors are the persons named in your will who have the responsibility to administer your estate after you die. They are required to submit your will to the probate court to obtain the 'Grant of Probate,' which gives them the legal authority to deal with your assets; pay off any debts and expenses of the administration; and distribute the property to the beneficiaries in accordance with the terms of your will. While many people may name friends or family to act as their executors, one must consider the factors that may frustrate your intentions, including situations where your named executors are unable or unwilling to act for whatever reason. Few people understand just how onerous the duties of the executor are, and there is scope for such executors to be sued by any one or more of the beneficences if the beneficiaries think they are not doing a good job. In other words, it is often a thankless task, and many people as a result refuse to take up the office. If there is no default executors named, then some other person or persons permitted by law will have to be appointed instead. There is a challenge, however, to locate such a person(s) and even if they agree to take up this task they may not have been considered suitable by the testator or their family.

Execution

Signing (otherwise known as 'executing") your will requires strict observance of certain procedures set out in the law. In order to be valid the will must be in writing and must signed in the presence of two witnesses. If you do not observe those formalities your will is likely to be void. In addition, if any one of those two witnesses are also beneficiaries of your estate, their entitlement under the will is void.

Marriage

Were you recently married? If so, any will that you had in place before your marriage is now invalid as a matter of law — and this fact is not widely known by the general public.

Domicile

The law of domicile is a complex area, but in a nutshell a person's domicile is determined by a number of factors which seek to link an individual to a particular country. If it turns out your domicile is not that of the Cayman Islands such laws may restrict your ability to dispose of your assets as you wish and may expose you to taxation.

Non-lawyers are generally not aware of this issue nor are they equipped to work out what their domicile might be. While that may not be an issue for born and bred Caymanians, given the large number of people who have expatriated from their country of origin to Cayman, it is a factor that needs to be considered in such cases. It also has to be born in mind that some countries seek to tax citizens no matter what their domicile status is.

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The United States, for example, taxes its citizens regardless of their domicile status. Given all it takes to become an American citizen is to be born on US soil, it does not take much to fall into this trap, and there are many Caymanians that may be unaware of their obligations to the IRS. If that is the case, steps can often be taken with careful planning to minimise exposure to US taxation.

Paperclips and staples

When a will is submitted for probate it is often examined for signs of tampering by the probate office. If there are multiple staples or paperclip marks it is possible for a will to be rejected and subject to scrutiny, and it may complicate the probate process and hinder the administration of the estate. This is often overlooked with homemade wills, and in some case, hand-written amendments.

Amendments

It is not possible to amend a will without following the same procedures surrounding the execution of a will as described above. To amend a will it is necessary to complete a legal document known as a 'codicil,' which is an addendum to the will. Therefore, it is not possible to simply 'strike out' any part of your will you dislike by hand. Such amendments will be invalid as a matter of law and will therefore be ineffective.

Mental capacity

Too often people try to sort out their wills when they are sick or elderly. Leaving it so late can raise a question of whether such an individual has the necessary mental capacity to create a valid will. If such a person does not have sufficient mental capacity even an otherwise perfectly valid will can be rendered invalid. If there is any doubt, both medical professionals and attorneys should work hand-in-hand to ensure there are no doubts raised.

A legal 'insurance policy'

Lastly, one of the very best reasons to instruct an attorney to prepare your will is that if the attorney gets it wrong, your beneficiaries may have somebody to sue. If you are the author of your own will, your beneficiaries will have no one to blame but yourself! If you instruct an attorney, it acts as a sort of 'insurance policy' as the buck will stop with the attorney. In other words, you are buying peace of mind along with a valuable service.

Conclusion

More often than not, the homemade will causes more problems than it solves. The legal fees involved in sorting out the aftermath will always exceed the legal fees involved to prepare a professional drafted will. Do not let your short term gain become long term pain for those loved ones left behind.

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